

In the Matter of the Compensation of  
**TRACY GAY, Claimant**  
WCB Case No. 22-02562  
**ORDER ON REVIEW**  
Julene M Quinn LLC, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Ogawa's order that: (1) found that he was terminated from his employment for violation of work rules under ORS 656.325(5)(b) regarding his entitlement to temporary disability benefits; (2) awarded a \$3,000 assessed attorney fee for his counsel's services at the hearing level regarding the temporary disability issue; and (3) assessed a \$1,000 penalty-related attorney fee for the SAIF Corporation's unreasonable claim processing. On review, the issues are temporary disability and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that SAIF improperly ceased claimant's temporary total disability (TTD) benefits under ORS 656.325(5)(b). In doing so, however, the ALJ found that the first element of ORS 656.325(5)(b) was met because claimant was terminated for violation of work rules. The ALJ awarded claimant's counsel \$3,000 for services regarding the temporary disability issue. The ALJ also awarded a penalty and a \$1,000 penalty-related attorney fee under ORS 656.262(11)(a) for SAIF's unreasonable claim processing.

On review, claimant does not dispute that SAIF unreasonably ceased his temporary disability benefits under ORS 656.325(5)(b). Rather, claimant disputes the ALJ's conclusion that he was terminated for violation of work rules. Claimant also contends that his counsel is entitled to an increased attorney fee for services at the hearing level related to the penalty under ORS 656.262(11)(a) and an increased attorney fee under ORS 656.383(2) for services at the hearing level related to the temporary disability issue. For the following reasons, we affirm in part and modify in part.

## Temporary Disability

As noted above, claimant contends on review that he was not terminated for violation of a work rule or for other disciplinary reasons as is required by ORS 656.325(5)(b). *See Dustin E. Hall*, 68 Van Natta 1465, 1472 (2016); *Robert P. Krise*, 54 Van Natta 911, 915 (2002), *aff'd on other grounds*, *SAIF v. Krise*, 196 Or App 608 (2004). Specifically, claimant asserts that “not having competency to perform a job does not constitute violation of a work rule or other disciplinary reason.”<sup>1</sup> We disagree with this contention.

When there is a dispute as to whether a claimant was terminated for violation of work rules or other disciplinary reasons, as is the case here, we are authorized to examine the factual issues to determine whether the claimant was, in fact, terminated for violation of a work rule.<sup>2</sup> *See Hipolito Coria*, 71 Van Natta 742, 744 (2019); *Krise*, 54 Van Natta at 914.

Here, the employer had a safety policy for its drivers as part of its company standards. (Ex. Ha-1; Tr. 21). According to the employer’s “New Pay Package,” the failure to meet its safety standards would result in disciplinary actions, remedial trainings, and up to suspension or termination based on the severity of the safety violation. (Ex. Ha-1). Moreover, the employer’s “New Pay Package” states that, “In general, a driver will be terminated if repeat performance issues, policy violations and safety violations, continue to exist. *If a driver is not performing safely*, it will be the company’s discretion to terminate immediately or provide the 3 strike opportunity.” (Ex. Ha-3) (emphasis added).

The record demonstrates that employees expressed concerns regarding claimant’s driving safety. (Exs. 21, 22; Tr. 33). These concerns included lack of geographical awareness, not knowing specific routes before getting on the road,

---

<sup>1</sup> Claimant also contends on review that the pre-hearing cessation of his TTD benefits violates his constitutional rights. However, claimant did not raise this constitutional challenge at the hearing level. (Hearing Record). Under such circumstances, we decline to address the constitutional argument, which claimant raises for the first time on review. *See Marsh v. SAIF*, 297 Or App 486, 491 (2019) (recognizing the Board’s plenary authority to determine preservation of issues and not consider issues not raised at the hearing level); *Fister v. South Hills Health Care*, 149 Or App 214, 218-19 (1997) (absent adequate reason, the Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing).

<sup>2</sup> Issues concerning whether claimant’s termination was unreasonable, unjustified, discriminatory, or unlawful are not within the purview of the workers’ compensation law. *Dustin Hall*, 68 Van Natta 1465, 1473 n 7 (2016). Accordingly, we have not decided the propriety of claimant’s termination in this case. Rather, we have decided only whether claimant was terminated for violation of a work rule.

difficulty completing daily forms and procedures, not completing daily vehicle inspections without assistance, struggles with right-hand turns at intersections, balking at verbal instructions and corrections, and the inability to safely operate a truck on his own. (Tr. 33, 34, 37, 38, 39, 40). Employees also expressed concerns with claimant's spatial awareness, trip planning, recognition of hazards, safe securement practices, some of the components using hours of service and electronics, and his ability to follow simple directions. (Tr. 55, 56).

Additionally, the employer's "Termination Form" stated that claimant was terminated because he had not shown the ability to operate a truck safely or efficiently after extensive training and he struggled with general awareness, trip planning, securement, execution, and following directions. (Ex. 22B-1).

Based on our review of the record, the totality of the circumstances, and for the reasons stated in the ALJ's order, we find that claimant was in violation of the employer's safety policies and was terminated for violation of work rules. *See* ORS 656.325(5)(b).

#### Attorney Fees

Claimant contends that his counsel is entitled to an increased attorney fee award for services at the hearing level related to the penalty under ORS 656.262(11)(a) and an increased attorney fee under ORS 656.383(2) for services at the hearing level related to the temporary disability issue.

We first address the penalty-related fee under ORS 656.262(11)(a). Claimant's counsel seeks the maximum fee amount of \$5,813 under ORS 656.262(11)(a). *See* OAR 438-015-0110(3). Based on the following reasoning, we find that a \$1,000 attorney fee is reasonable.

Attorney fees involving ORS 656.262(11)(a) shall be in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors sets forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case. *See* OAR 438-015-0110(1), (2). Moreover, an attorney fee awarded under ORS 656.262(11)(a) shall not exceed \$5,813, absent a showing of extraordinary circumstances. *See* OAR 438-015-0110(3); Workers' Compensation Board (WCB) Bulletin No. 1 (eff. June 1, 2023).

Here, the ALJ awarded claimant's counsel a \$1,000 attorney fee under ORS 656.262(11)(a) for services regarding the unreasonable claim processing issue. Based on our review of the record, and considering the above factors (including those portions of the hearing record that concerned this unreasonable claim

processing issue), we find that a \$1,000 attorney fee is reasonable for services at the hearing level regarding the unreasonable claim processing issue. *See Robert P. Kelly*, 73 Van Natta 520, 524 (2021); *Larry D. Higgins*, 71 Van Natta 808, 814 (2019).

We turn to the ORS 656.383(2) attorney fee. As noted above, the ALJ awarded a \$3,000 attorney fee under ORS 656.383(2) for services at the hearing level regarding the temporary disability issue. On review, claimant contends that his counsel is entitled to a \$15,000 attorney fee for services at the hearing level regarding this issue. SAIF responds that a \$3,000 fee is reasonable. Based on the following reasoning, we modify the ALJ's attorney fee award.

In determining a reasonable attorney fee award, we apply the factors set forth in OAR 438-015-0010(4) to the circumstances of each case. *See Schoch v. Leupold & Stevens*, 325 Or 112, 118-19 (1997). Those factors are: (1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the necessity of allowing the broadest access to attorneys by injured workers; (8) the fees earned by attorneys representing the insured/self-insured employer, as compiled in the Director's annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656; (9) the risk in a particular case that an attorney's efforts may go uncompensated; (10) the contingent nature of the practice of workers' compensation law; (11) the assertion of frivolous issues or defenses; and (12) claimant's counsel's contingent hourly rate, if asserted, together with any information used to establish the basis on which the rate was calculated.<sup>3</sup>

In this case, the hearing record contained 56 exhibits, 26 of which were submitted by claimant's counsel. The telephonic hearing (which convened on two occasions) lasted approximately 10.5 hours. The disputed temporary disability issue involved factual and legal issues of average complexity compared to other cases litigated before the Hearings Division. The "value of the interest involved" and the "benefits obtained for claimant" include potential temporary disability benefits. Finally, claimant's counsel and SAIF's counsel are highly skilled and experienced practitioners.

---

<sup>3</sup> We are not required to make findings for each rule-based factor. *See Weyerhaeuser Co. v. Fillmore*, 98 Or App 567, 571 (1989) (the Board is not required to make findings as to each rule-based factor regarding a reasonable attorney fee award, but the Board's explanation must be detailed enough to establish a reasonable basis for its decisions); *Christopher Taylor*, 73 Van Natta 439 (2021).

Considering the above factors, we find that a reasonable attorney fee for claimant's counsel's services at the hearing level regarding the temporary disability issue is \$6,000, to be paid by SAIF. Accordingly, we modify the ALJ's attorney fee award.

Claimant's counsel is also entitled to an assessed attorney fee for services on review regarding the ORS 656.383(2) attorney fee issue. ORS 656.383(2). Claimant has requested "bifurcation" of the attorney fee award. *See* OAR 438-015-0125. Under such circumstances, we award a reasonable assessed fee, in the amount to be determined in Workers' Compensation Case No. 23-00002BF (payable by SAIF) after this order becomes final.

### ORDER

The ALJ's order dated September 29, 2022, is affirmed in part and modified in part. In lieu of the ALJ's \$3,000 attorney fee awarded under ORS 656.383(2), claimant's counsel is awarded a \$6,000 attorney fee under ORS 656.383(2), payable by SAIF. The remainder of the ALJ's order is affirmed. For claimant's counsel's services on review regarding the ORS 656.383(2) attorney fee issue, claimant's counsel is awarded an assessed fee, payable by SAIF, to be determined in WCB No. 23-00002BF.

Entered at Salem, Oregon on August 15, 2023